

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 19, 2017

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Caroline Sweeney, Deputy Director
Office of Legal Services

Janis Hudson, Staff Attorney
Office of Legal Services

Subject: Consideration of a Petition for Rulemaking

Docket No.: 2017-0534-PET

Project No.: 2017-023-PET-NR

Who Submitted the Petition:

On April 13, 2017, the Texas Commission on Environmental Quality (TCEQ or commission) received a petition from Jed Anderson (petitioner).

What the Petitioner Requests:

The petitioner requests the commission amend 30 Texas Administrative Code (TAC) Chapter 1 in the following two ways (new text underlined):

Amend §1.1:

The purpose of the commission's rules is to implement the powers and duties of the commission under the Texas Water Code, the Texas Health and Safety Code, and other laws, to establish the general policies of the commission, and to set forth procedures to be followed in agency proceedings. The rules should be written and interpreted to simplify procedure, avoid delay, save expense, and facilitate the administration and enforcement of state and other laws by the agency.

Add §1.11:¹

Section 1.11, Simplifying Procedure for Existing Rules
For the purposes of fostering implementation of the simplification requirements established in Section 1.1, the commission shall remove two regulatory requirements for every regulatory requirement added to the extent practicable.

Recommended Action and Justification:

Although the executive director has determined that the petition meets the requirements for filing a petition with TCEQ in 30 TAC §20.15, the executive director recommends the petition be denied.

¹ The Petition requests new §1.11. However, this section number is currently in use (Service on Judge, Parties, and Interested Persons). The executive director understands this request is for a new section, regardless of the number, in 30 TAC Chapter 1, and responds accordingly.

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While appreciating the value of expressly including the word "written" in the rule, the executive director believes TCEQ rules are written with this goal in mind and it is implied in the rule itself that the rule should be written in such a manner if it is also to be interpreted for such a result. When adopting, amending, or repealing rules, the commission complies with various statutory requirements including Subchapters A and B of the Texas Administrative Procedure Act in Texas Government Code, Chapter 2001; Texas Water Code (TWC), §§5.102, 5.103, and 5.105; and Texas Health and Safety Code, §361.024 and §382.017. Inherent in those statutes, and others, is the requirement that a rule be within the commission's jurisdiction and authority, and that it be enforceable. All rules are subject to public notice and comment which provide the opportunity for the commission to consider changes, including for applicability, scope, enforceability, and clarity of the proposed rules. This process results in the commission adopting rules that meet the requirements in §1.1, a requirement that the commission has established for itself. The same reasoning applies to the suggested new rule.

With regard to the suggested new rule, a requirement to remove two regulatory requirements for every added requirement could jeopardize or interfere with federal program delegation or approval. Although the petition refers to some air quality programs, TCEQ adopts rules necessary to fulfill a federal requirement or to maintain approval, delegation, or primacy to implement all or part of a number of other programs, including the following federal programs:

- New Source Performance Standards under the Federal Clean Air Act (FCAA), such as state plan requirements for existing sources;
- National Emission Standards for Hazardous Air Pollutants under the FCAA, such as regulations to implement Maximum Achievable Control Technology;
- FCAA requirements for a state implementation plan for the national ambient air quality standards;
- Title V Federal Operating Permit and Major New Source Review permitting programs under the FCAA;
- Texas Pollutant Discharge Elimination System permitting program;
- Texas Surface Water Quality Standards in accordance with the Federal Clean Water Act (FCWA);
- Surface water quality monitoring, assessment, and restoration activities in accordance with the FCWA, including development of the 303(d) List of Impaired Waters and Total Maximum Daily Loads;
- Public Water System Supervision program;
- The Underground Storage Tank Program;
- The Underground Injection Control Program;
- Waste permitting under the federal Resource Conservation and Recovery Act; and
- The radiation control program.

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The TCEQ also has authority for implementation of state law regarding, among other things, water rights, district matters, environmental testing laboratory accreditation, and on-site sewage facilities. The suggested new rule would affect all of these programs.

In addition, a requirement to remove two rules for every rule adopted could affect TCEQ with respect to rules necessary to implement statutes for any of these programs, including those that: require implementation by specific deadlines, require rulemaking in an expedited manner, or are adopted to ensure public health and welfare under federal or state law, and procedural rules of the commission. The suggested new rule provides an exception by including the text "to the extent practicable," which could be triggered, for example, if and when rules are adopted on an emergency basis under Texas Government Code, §2001.034. Some rules are narrowly tailored to allow for consistency in rule structure and to minimize lengthy individual rules, such as in 30 TAC Chapter 117 (Control of Air Pollution from Nitrogen Compounds). In particular, the commission must retain the ability to adopt rules to implement new programs under federal or state statutes, which includes the ability to repeal rules as part of a rulemaking project.

Because the suggested new rule includes a reference to 30 TAC §1.1, the executive director assumes that the reference to "regulatory requirement" is a reference to a rule, as opposed to a requirement in a permit or other form of authorization issued by the TCEQ or in an order of the commission. However, the petition also refers to special conditions in permits, stating that permits have become lengthier and more complex in part because they do not go through notice and comment rulemaking. The executive director disagrees with this statement. Draft permits for case-by-case permit applications in all programs are subject to notice and comment, and many are also subject to opportunity for contested case hearing. Changes can and are made to the draft permits in response to public comment. General permits, such as multi-sector general permits and air quality standard permits, are subject to the public comment process as part of the permit adoption process by the commission in open meeting.

With regard to the discussion in the petition regarding consolidation and simplification of federal programs by TCEQ, the executive director notes that TCEQ staff work with the EPA to implement the programs in the appropriate manner, whether that be by rulemaking or other enforceable mechanisms.

Finally, principles of administrative law require an executive branch agency to adopt or amend a rule when it changes its requirements. The suggested new rule regarding removal of two regulatory requirements for every one added focuses on the number of requirements rather than the substance of the requirements. The commission is regularly called upon to balance the need for environmental regulation and the cost associated with regulation, and manages its resources to adapt to changes in the law and state and federal funding.

The executive director acknowledges that environmental regulation is complex, and that the TCEQ has the responsibility to ensure that the programs it administers are clearly articulated and enforceable, and in compliance with federal and state statutes. However, for the above reasons, the executive director does not recommend the commission

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initiate rulemaking to propose the two changes recommended in the petition that would affect the commission's responsibilities.

Applicable Law:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- 30 TAC §20.15, which provides such procedures specific to the commission;
- TWC, §5.011, which provides that the purpose of TWC, Chapter 5 is to provide for efficient and effective administration of the conservation of natural resources and protection of the environment;
- TWC, §5.012, which provides that the TCEQ is the agency given primary responsibility for implementing the constitution and law of Texas relating to the conservation of natural resources and the protection of the environment;
- TWC, §5.013, which provides the general jurisdiction of the commission;
- TWC, §5.102, which provides the general powers of the commission; and
- TWC §5.103, which provides the rulemaking powers of the commission.

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Attachment:

Petition

cc: Chief Clerk, 2 copies
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